

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

<div style="display: flex; justify-content: space-between;"><div style="width: 60%;"><p>NORTH AMERICA PHOTON INFOTECH, LTD.,</p><p style="text-align: center;">Plaintiff,</p><p style="text-align: center;">v.</p><p>ACQUIA, INC.,</p><p style="text-align: center;">Defendant.</p></div><div style="width: 35%; text-align: center;"><p>X</p><p>:</p><p>:</p><p>:</p><p>Civil Action. No. 1:22-cv-12052 (FDS)</p><p>:</p><p>:</p><p>DEFENDANT ACQUIA, INC.’S THIRD MOTION TO COMPEL DISCOVERY AND FOR SANCTIONS</p><p>:</p><p>:</p><p>:</p><p>:</p><p>:</p><p>X</p></div></div>	X	Civil Action. No. 1:22-cv-12052 (FDS)
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Pursuant to Local Rule 37.1(b) and Fed. R. Civ. P. 37(a)(3)(B)(iv), 37(a)(5), 37(b)(2)(A) and (C), Defendant Acquia, Inc. (“Acquia”) respectfully moves the Court to enter an order: (1) compelling Plaintiff North America Photon Infotech, Ltd. (“Photon”) to produce all outstanding documents and communications responsive to Acquia’s requests outlined in Acquia’s memorandum [ECF No. 56 at 6-7]; (2) awarding Acquia \$10,000 in attorney’s fees and costs incurred in attempting to review over 20,000 pages of documents produced as three single non-searchable PDFs and having to file its Third Motion to Compel for Photon’s non-compliance with the Court’s Order [ECF No. 64]; and (3) award the \$5,000 previously requested by Acquia for Photon’s improper use of Fed R. Civ. P. 33(d) in responding to Acquia’s interrogatories [ECF No. 62]. As grounds for this motion Acquia states as follows:

1. On March 13, 2024, this Court issued an order on Acquia's second motion to compel requiring Photon to, among other things, "provide new responses and documents within two weeks from the date of this order in accordance with the requests outlined in Acquia's memorandum." [ECF No. 64 at 4]. The Court also ordered Photon to "show cause both why it should not be sanctioned [for its second deficient interrogatory answers], and also why, if this Court decides to sanction Photon, it should not pay the [\$5,000] amount requested by Acquia." [*Id.* at 6]. Photon's response was due no later than March 27, 2024. [*Id.*]

2. On March 14, 2024, this Court extended the fact discovery deadline to May 10, 2024. [ECF No. 65].

3. On March 27, 2024, Photon filed a motion requesting a two-week extension (i.e., until April 10, 2024) to comply fully with the Court's order. [ECF No. 66]. The Court has not ruled on Photon's motion. Declaration of Irwin B. Schwartz In Support of Third Motion to Compel and for Sanctions (hereinafter, the "Schwartz Decl."), ¶ 3.

4. On March 27, 2024, Photon made its first supplemental document production to Acquia of 1,311 pages in a single PDF that was not searchable all of which were designated as Highly Confidential. Schwartz Decl. ¶ 4.¹

5. On March 28, 2024, Acquia sent an email to Photon identifying several insufficiencies in Photon's first supplemental document production, including the non-searchable single PDF, the Highly Confidential designation, large categories of emails missing from the production, and emails produced without attachments, and requesting a meet and confer. *Id.* ¶ 5.²

¹ A true and correct copy of Photon's First Amended Responses to Acquia's Request for Production Nos. 1, 3 and 5 is included as Exhibit A to the Schwartz Decl.

² A true and correct copy of Acquia's email to Photon is included as Exhibit B to the Schwartz Decl.

6. On March 28, 2024, Photon filed its response to the Court's show cause order. [ECF No. 67].

7. On April 4, 2024, counsel for the parties met and conferred and Photon's counsel promised to take up the issue of the single non-searchable PDF production with his client and indicated that more materials would be forthcoming. Schwartz Decl. ¶ 6.

8. On April 9, 2024, Photon made its second supplemental document production to Acquia, which consisted of a non-searchable single PDF containing 17,347 pages, each of which was designated as Highly Confidential. *Id.* ¶ 7.

9. On April 10, 2024, Acquia sent an email to Photon identifying several deficiencies in Photon's second supplemental document production, including the non-searchable single PDF, the Highly Confidential designation, large categories of emails missing from the production, and emails produced without attachments, and again requesting a meet and confer. *Id.* ¶ 8.³

10. On April 10, 2024, Photon made its third supplemental document production to Acquia, which again consisted of a non-searchable single PDF containing 3,181 pages, each of which was designated as Highly Confidential, including 1,032 blank pages. *Id.* ¶ 9.

11. On April 11, 2024, Acquia sent an email to Photon identifying several deficiencies in Photon's third supplemental document production, specifying three categories of information that had not been produced notwithstanding the Court's order on Acquia's Second Motion to Compel, and renewing its request for a meet and confer. *Id.* ¶ 10.⁴

³ A true and correct copy of Acquia's email correspondence with Photon is included as Exhibit C to the Schwartz Decl.

⁴ A true and correct copy of Acquia's email correspondence with Photon is included as Exhibit D to the Schwartz Decl.

12. Counsel for Acquia incurred 12.5 hours at a cost of \$5,375 in attempting to review Photon's single PDFs without any search capability before Photon indicated that it would reproduce its last three productions, to include removing the blank pages. *Id.* ¶ 11.

13. On April 12, 2024, Photon left a voice mail and sent an email to Acquia indicating it would reproduce its prior three productions in separate searchable PDF documents but did not respond to Acquia's request to meet and confer on the missing categories of documents that the Court ordered Photon to produce. Photon also refused to explain why the original production was made in single non-searchable PDFs. *Id.* ¶ 12; Exhibits C and D.

14. On April 18, 2024, Photon sent an email to Acquia indicating it would provide its privilege log and a corrected production by the end of the day but did not respond to Acquia's query regarding whether the production would include any additional documents. *Id.* ¶ 13; Exhibit D.

15. On April 19, 2024, Photon sent an email to Acquia stated it had not yet received the corrected production from its new vendor, yet offered to date when it would be produced and did not respond to Acquia's question of whether the new production would include documents in addition to what had been produced in the single PDFs. *Id.* ¶ 14.⁵

16. As of April 19, 2024, more than three weeks after the Court-ordered deadline for compliance and without permission from the Court, Photon still has not made a proper and full production of the documents required by the Court. *Id.* ¶ 15.

⁵ A true and correct copy of Acquia's email correspondence with Photon is included as Exhibit E to the Schwartz Decl.

17. Photon violated the Court's order [ECF No. 64] by failing to timely produce all documents and communications responsive to Acquia's requests outlined in Acquia's memorandum [ECF No. 56 at 6-7]. Schwartz Decl. ¶ 16.

18. Because Photon has not produced the documents that the Court ordered by March 27, 2024, Acquia has been unable to review the documents and schedule the remaining depositions that were also approved by the Court. *Id.* ¶ 17.

19. Counsel for Acquia incurred 18.3 hours at a cost of \$7,869 in bringing this third motion to compel and for sanctions. *Id.* ¶ 18.

CONCLUSION

For the reasons set forth in its accompanying memorandum, Acquia respectfully requests that the Court grant this motion and enter an order:

- (i) compelling Photon to produce all outstanding documents and communications responsive to Acquia's requests outlined in Acquia's memorandum [ECF No. 56 at 6-7];
- (ii) (ii) awarding Acquia \$10,000 in attorney's fees and costs incurred in attempting to review over 20,000 pages of documents produced as three single non-searchable PDFs and in having to file its Third Motion to Compel and for Photon's non-compliance with the Court's Order [ECF No. 64];
- (iii) (iii) award the \$5,000 previously requested by Acquia for Photon's improper use of Fed R. Civ. P. 33(d) in responding to Acquia's interrogatories [ECF No. 62]; and
- (iv) (iv) granting Acquia such other and further relief as this Court deems just and proper.

Dated: April 19, 2024

Respectfully Submitted,

Acquia Inc.,
By its attorney,

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LOCAL RULES 7.1(a)(2) & 37.1(b) CERTIFICATE OF CONFERENCE

I hereby certify that on multiple occasions between March 27, 2024 and April 18, 2024 by e-mail and by telephone on April 4, 2024, I conferred with Samuel Joyner, counsel for Plaintiff North America Photon Infotech, Ltd. ("Photon"), regarding Photon's non-compliance with the Court's discovery order, including the inappropriate production of over 20,000 pages of documents in single non-searchable PDFs, the over designation documents as Highly Confidential, and the failure to produce certain categories of documents as ordered by the Court. While Mr. Joyner promised to correct the formatting issue and produce the document again, Photon still has not yet done so and the parties were unable to resolve Photon's remaining failures thereby necessitating this Third Motion to Compel and for Sanctions.

/s/ Irwin B. Schwartz
Irwin B. Schwartz

CERTIFICATE OF SERVICE

I, Irwin B. Schwartz, as attorney for Defendant Acquia, Inc., hereby certify that on this 19th day of April 2024, I filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Irwin B. Schwartz

Irwin B. Schwartz